

MINUTES

**MONTANA SENATE
59th LEGISLATURE - REGULAR SESSION**

COMMITTEE ON JUDICIARY

Call to Order: By **CHAIRMAN MIKE WHEAT**, on March 4, 2005 at 8:05 A.M., in Room 303 Capitol.

ROLL CALL

Members Present:

Sen. Mike Wheat, Chairman (D)
Sen. Jon Ellingson (D)
Sen. Jesse Laslovich (D)
Sen. Lynda Moss (D)
Sen. Jerry O'Neil (R)
Sen. Gerald Pease (D)
Sen. Gary L. Perry (R)
Sen. Jim Shockley (R)

Members Excused: Sen. Brent R. Cromley (D)
Sen. Aubyn Curtiss (R)
Sen. Jeff Mangan (D)
Sen. Dan McGee (R)

Members Absent: None.

Staff Present: Valencia Lane, Legislative Branch
Mari Prewett, Committee Secretary

Please Note. These are summary minutes. Testimony and discussion are paraphrased and condensed.

Committee Business Summary:

Hearing & Date Posted: HB 24, 3/1/2005; HB 26, 3/1/2005;
HB 25, 3/1/2005; HB 64, 3/1/2005;
HB 222, 3/1/2005; HB 331, 3/1/2005
Executive Action: None.

HEARING ON HB 24

{Tape: 1; Side: A; Approx. Time Counter: 0.7 - 2.5}

Opening Statement by Sponsor:

REP. GEORGE GOLIE (D), HD 20, said that HB 24 is the result of the Senate Joint Resolution 32 (SJR 32) medical malpractice rates and availability study held during the interim. HB 24 is an act to express apology without the apology being admissible for any purpose in a civil action of liability for medical malpractice. The intent of the legislation is to open up constructive communication between health care providers and those receiving health care, including their families and friends.

Proponents' Testimony:

{Tape: 1; Side: A; Approx. Time Counter: 2.5 - 6.6}

Dr. Mike Schweitzer, Rocky Mountain Health Network, and Dr. Mark Rumans, Chief of Staff, Deaconess Billings Clinic, provided written comments in support of HB 25.

[EXHIBIT\(jus48a01\)](#)

[EXHIBIT\(jus48a02\)](#)

{Tape: 1; Side: A; Approx. Time Counter: 6.6 - 8.5}

Larry Riley, Utah Medical Insurance Association, spoke about a 5-hour workshop that he attended which was sponsored by the Helena Education Foundation. The workshop pointed out the important medicine of "apology". He said that HB 24 did not restrict a person's ability to bring forth a lawsuit, but it does free people up to allow the very best in them to come out--to express sympathy and concern where it is felt, but where they now feel constrained to do so because of fears that it could be used against them.

{Tape: 1; Side: A; Approx. Time Counter: 8.5 - 9.2}

Pat Melby, MT Medical Association (MMA), said that HB 24 could bring compassion into the practice of medicine and the relationship between physicians and their patients.

{Tape: 1; Side: A; Approx. Time Counter: 9.2 - 14.7}

Mike Foster, Four Sisters of Charity of Leavenworth Hospitals, Billings, Butte, Miles City, and Harlowton, provided a letter

from **Dr. James Kiser, St. James Healthcare** which pointed out the rising medical malpractice insurance premiums.

EXHIBIT(jus48a03)

Mr. Foster said that rising medical malpractice insurance premiums are affecting the price of health care, and HB 24--the sympathy bill--is an important piece of the puzzle. He said that the Rocky Mountain Health Network conducted a survey, and preliminary numbers point out the tremendous increases in premiums. He requested the Committee's support of HB 24.

{Tape: 1; Side: A; Approx. Time Counter: 14.7 - 18.9}

Mark Taylor, MT Hospital Association (MHA), said that the MHA was the principle drafter of SJR 32. As a result of the insurance crisis, MHA has also been a principle in forming the Yellowstone Insurance Exchange--a captive insurer representing 16 facilities in Montana. HB 24 is part of the solution package to address the rising costs of medical malpractice insurance premiums.

Steve Yeakel, MT Council for Maternal and Child Health, spoke in support of the entire solution package to address the rising costs of medical malpractice insurance premiums. He said that the Council sees the rising cost of premiums as an access to care issue and believes that families are in significant risk of losing services that they need.

{Tape: 1; Side: A; Approx. Time Counter: 18.9 - 19.4}

Barbara Ranf, MT Chamber of Commerce, said that the solution package is important to support the efforts of keeping quality health care affordable and available to all Montanans. Health care is a critical part of the economy, and she urged the Committee's support for the series of bills.

Gloria Hermanson, MT Academy of Eye Surgeons and The Society of Ear, Nose, and Throat Surgeons; Jacqueline Lenmark, American Insurance Association (AIA); Joe Mazurek, Blue Cross Blue Shield of MT (BCBSMT); Riley Johnson, National Federation of Independent Business (NFIB), spoke in support of HB 24 as part of the entire solution package.

{Tape: 1; Side: A; Approx. Time Counter: 20.9 - 24.0}

Al Smith, MT Trial Lawyers Association (MTLA), said that the underlying principle of the solution package legislation is to help the healthcare industry without hurting victims of medical malpractice. HB 24 could be the one bill regarding medical

malpractice insurance that may do the most good in the state. He said that states, where they do not have the bill, have seen significant declines in the number of malpractice lawsuits filed and the amounts of money spent on the defense of medical malpractice cases just by adopting an "I'm sorry" policy. He provided information regarding a policy adopted by the University of Michigan Health System.

EXHIBIT(jus48a04)

Opponents' Testimony: None.

Informational Testimony: None.

Questions from Committee Members and Responses: None.

{Tape: 1; Side: A; Approx. Time Counter: 24 - 25.4}

Closing by Sponsor:

REP. GOLIE said that HB 24 is part of the solution, and it opens up communication to reduce medical malpractice claims resulting in less litigation. HB 24 and the other parts of the solution package are intended to stabilize rates and keep many of the physicians, particularly in rural Montana, practicing medicine. He added that HB 24 did not restrict any legal rights. He requested the Committee's support of HB 24.

HEARING ON HB 26

{Tape: 1; Side: B; Approx. Time Counter: 6.9 - 7.8}

Opening Statement by Sponsor:

REP. GEORGE GOLIE (D), HD 20, said that HB 26 clarifies the liability among health care providers. Many times, a physician practicing in a hospital is not an employee of the hospital. HB 26 is needed because a patient does not always know whether the physician is an employee or agent of the hospital. Therefore, the hospital can be found liable for a physician who is not on staff on the theory that the physician was an ostensible agent of the hospital. An ostensible agent is a person who has the apparent authority to act for the hospital even if actual authority has not been confirmed. HB 26 provides that a person or entity alleged to have been the ostensible agent of their health care provider may not impose liability on a health care provider for an act or omission.

{Tape: 1; Side: B; Approx. Time Counter: 9.1 - 11.8}

Proponents' Testimony:

Dr. Mark Rumans, Deaconess Billings Clinic, provided written comments in support of HB 26.

EXHIBIT(jus48a05)

{Tape: 1; Side: B; Approx. Time Counter: 11.8 - 14.3}

Mark Taylor, MHA, said that HB 26 has the greatest impact on hospitals, and MHA fully endorses HB 26 as amended by the House.

Mike Foster, Four Sisters of Charity of Leavenworth Hospitals, said that the ostensible agent issue could lead to huge problems for hospitals. HB 26 goes a long way in resolving some of those issues. He requested the Committee's support.

Pat Melby, MMA; Gloria Hermanson, MT Academy of Eye Surgeons and The Society of Ear, Nose, and Throat Surgeons; Barbara Ranf, MT Chamber of Commerce; Joe Mazurek, BCBSMT; and Jacqueline Lenmark, AIA, stood in support of HB 26.

{Tape: 1; Side: B; Approx. Time Counter: 14.3 - 15.4}

Al Smith, MTLA, said that the MTLA supports HB 26 because of the provision that hospitals will continue their current practice of assuring that people have adequate malpractice insurance if they are granted privileges to practice at the hospitals. He said that there is a potential for a catastrophic case where there may not be enough money for a client based upon the amount of money that the negligent doctor might have. HB 26 will preclude those types of cases, but the reality is, that Montana does not have multimillion dollar jury awards. HB 26 is a good compromise.

{Tape: 1; Side: B; Approx. Time Counter: 15.4 - 15.5}

Opponents' Testimony: None.

Informational Testimony: None.

Questions from Committee Members and Responses: None.

{Tape: 1; Side: B; Approx. Time Counter: 15.7 - 17.8}

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Closing by Sponsor:

REP. GOLIE said that HB 26 is another piece of legislation that originated from the SJR 32 study, and it clarifies liability in a hospital setting. The amendment added in the House maintains that hospitals will keep their current practice of individual employees carrying medical malpractice insurance.

HEARING ON HB 25**Opening Statement by Sponsor:**

{Tape: 1; Side: B; Approx. Time Counter: 17.8 - 18.9}

REP. DON ROBERTS (R), HD 56, said that HB 25 is a component of the SJR 32 resolutions. When a practitioner enters a hospital to perform a service, many of the people who may be assisting the practitioner may not be his or her employee, but have been hired by the hospital to act as an assistant of services. HB 25 provides protection for the health care provider. If people under the practitioner's employ commit an act or omission, the practitioner is not held liable. However, HB 25 does not absolve a health care provider from liability under 27-1-703, MCA.

Proponents' Testimony:

{Tape: 1; Side: B; Approx. Time Counter: 18.9 - 27.6}

Larry Riley, Utah Medical Insurance Association, provided background information related to a 1985 case, that arose in Helena. He said that the responsibility is needed for those acts of negligence that people are directly responsible for and not stick somebody with responsibility when they had nothing to do with the problem. HB 26 clarifies that when a patient is in the hospital and the patient is harmed by the conduct of someone else, that person can be sued. However, the surgeon who had nothing to do with or who was not responsible for that conduct could not be sued.

Pat Melby, MMA, and Dr. Mark Rumans, Deaconess Billings Clinic, spoke in support of HB 25.

Dr. Bradley Anderson, Urologic Surgeon, Billings, provided written comments in support of HB 25.

[EXHIBIT\(jus48a06\)](#)

[EXHIBIT\(jus48a07\)](#)

{Tape: 1; Side: B; Approx. Time Counter: 27.6 - 27.7}

Mona Jamison, MT Orthopedic Society, said that the Society believes that if there is individual responsibility by all of the health care providers in a particular health care forum, the results will reflect that each person knows that they must take responsibility for their actions and expertise. She said that although the Society speaks in support of all of the legislation related to the solution package for medical malpractice insurance, it did not believe that they would solve the problem, only that they would contribute to solving the problem.

Mark Taylor, MHA; Gloria Hermanson, MT Academy of Eye Surgeons and The Society of Ear, Nose, and Throat Surgeons; Mike Foster, Four Sisters of Charity of Leavenworth Hospitals; Aaron Billin, Board Certified Family Physician, Hardin; Joe Mazurek, BCBSMT; Barbara Ranf, MT Chamber of Commerce; and Jacqueline Lenmark, AIA, spoke in support of HB 25.

{Tape: 2; Side: A; Approx. Time Counter: 0.2 - 1.8}

Dr. John Wilson, Orthopedic Surgeon, Billings, said that every day he takes on hundreds of responsibilities as he cares for his patients, and every day he trusts properly trained people to carry on their responsibilities. It would be impossible for him to check and double check everything done during the day. He relies on his operative personnel to keep track of sponge counts. If he had to do that also, it means another 10 minutes of surgery time. He felt it did not provide good patient care, and it was unfair to pass on responsibility to increase the awards that patients receive.

{Tape: 2; Side: A; Approx. Time Counter: 1.8 - 1.9}

Al Smith, MTLA, said that HB 25 was again another compromise bill and MTLA supports it as long as people are adequately insured and as long as people are willing to take responsibility for their actions. Referring to previous testimony by **Dr. Bradley Anderson** (See Exhibit 7), **Mr. Smith** commented that one of the things that California has that Montana does not have is insurance reform. All insurers in California cannot raise their rates without prior approval from the Insurance Commission, and all citizens can challenge rate increases. He hoped that Montana would have this type of reform in the 2007 Session.

Opponents' Testimony: None.

Informational Testimony: None.

Questions from Committee Members and Responses:***{Tape: 2; Side: A; Approx. Time Counter: 4 - 7.3}***

SEN. JERRY O'Neil, SD 3, asked who was ultimately responsible for ensuring that all sponges are removed during surgery. **Mr. Riley** said the people responsible are those who are given the responsibility to ensure that the task is done; i.e., the nurses within the operating room who are trained by the hospital. The hospital is then responsible for them because they are an employee of the hospital. If they do make a mistake, the patient has a claim against the hospital because the hospital's employee made the mistake. **SEN. O'NEIL** asked if a hospital was responsible for a private medical laboratory where tissue samples are sent. **Mr. Riley** said, no, that the private laboratory would be responsible because the laboratory is not an employee of the hospital.

{Tape: 2; Side: A; Approx. Time Counter: 7.3 - 9.6}**Closing by Sponsor:**

REP. ROBERTS said that there are 21 practitioner-owned companies in the country. In the past 10 years, one company had 5,000 cases filed against practitioners. Remembering each case costs approximately \$25,000 to investigate, 85% of the 5,000 cases were dropped because there was no malpractice and 10% were settled. Of the 5% that went to court, 73% were won by the practitioners. He said there is a lot of money in the system that is not directed to the patients. The solution package legislation would curtail unnecessary activity.

HEARING ON HB 64**Opening Statement by Sponsor:*****{Tape: 2; Side: A; Approx. Time Counter: 9.6 - 14.3}***

REP. ROY BROWN (R), HD 49, said that HB 64 is an expert witness qualification bill and originated as a result of the SJR 32 study. HB 64 arose from concerns expressed by doctors in Billings regarding the problems with expert witnesses. HB 64 is very explicit about who would qualify to become an expert witness. To qualify, the expert witness must be licensed in at least one state; must ordinarily or routinely treat the diagnosis or condition; must provide the type of treatment that is the subject matter of the claim; be an instructor of students at an accredited health professional school or accredited residency;

and they must be competent as a result of education, training, knowledge and experience in the diagnosis. They must also be a physician and have some expertise in the specialty. Amendments to HB 64 address the changes to the language "routinely" and adds an allowance of five years after a person retires so that they can still work as an expert witness.

{Tape: 2; Side: A; Approx. Time Counter: 14.3 - 16.5}

Proponents' Testimony:

Tom Ebzery, St. Vincent, Holy Rosary, St James, and Wheatland Memorial Hospitals, said that HB 64 is legislation that was started in the 2003 Session by discussions with Billings physicians about medical liability rates and problems that they had experienced with expert witnesses. That bill did not survive the process, but SJR 32 did. HB 64 was more contentious than the other recommendations, but there were great compromises among the stakeholders. He urged the Committee's support.

{Tape: 2; Side: A; Approx. Time Counter: 16.5 - 21.6}

Pat Melby, MMA, said the basis of HB 64 is S-11 introduced in the United States Congress. S-11 was tailored to meet the needs of Montana resulting in HB 64. He urged the Committee's support.

Mike Schweitzer, Rocky Mountain Health Network, and Dr. Mark Rumans, Deaconess Billings Clinic, provided written comments in support of HB 64.

[EXHIBIT\(jus48a08\)](#)

[EXHIBIT\(jus48a09\)](#)

{Tape: 2; Side: A; Approx. Time Counter: 21.6 - 25.2}

Larry Riley, Utah Medical Insurance Association; Mona Jamison, MT Orthopedic Society; Mark Taylor, MHA; Gloria Hermanson, MT Academy of Eye Surgeons and The Society of Ear, Nose, and Throat Surgeons; Barbara Ranf, MT Chamber of Commerce; Joe Mazurek, BCBSMT; Jacqueline Lenmark, AIA; and Al Smith, MTLA, stood in support of HB 64 with the amendments.

Opponents' Testimony: None.

Informational Testimony: None.

Questions from Committee Members and Responses:***{Tape: 2; Side: A; Approx. Time Counter: 25.2 - 27.2}***

Referring to testimony from **Dr. Mike Schweitzer**, **SEN. BRENT CROMLEY, SD 25**, asked if there was a citation for the case and will it show that HB 64 will actually accomplish something. **Mr. Ebzery** said that he would meet with **Dr. Schweitzer** and receive a citation before the Committee takes Executive Action.

{Tape: 2; Side: A; Approx. Time Counter: 27.2 - 28.7}

SEN. JIM SHOCKLEY, SD 45, asked about the difference between HB 64 and the legislation that failed in the 2003 Session. **REP. BROWN** said that the legislation introduced in the 2003 Session put further restrictions on who could be an expert witness. The biggest complaints with that legislation were expert witnesses who were not actively in the physician business, for example, a retiree, and someone who was a medical school instructor could not testify.

SEN. O'NEIL asked if attorneys used the chief nurse of an operating room as an expert witness. **Mr. Smith** said that plaintiffs could use a nurse as a witness to testify about procedures within the operating room. However, as far as what the doctor did, no, they would not be qualified as an expert under current rules or HB 64.

{Tape: 2; Side: B; Approx. Time Counter: 2.5 - 3.1}**Closing by Sponsor:**

REP. BROWN said that HB 64 helps Montana get to where it needs to go with its medical malpractice liability crisis. He urged the Committee's support.

HEARING ON HB 222***{Tape: 2; Side: B; Approx. Time Counter: 3.1 - 5.5}*****Opening Statement by Sponsor:**

REP. DON ROBERTS (R), HD 56, said that HB 222 parallels a Nevada law that limits damages for care related to traumatic condition. It caps the noneconomic damages at \$100,000. He said that trauma care is far different than routine care. There are certain risks with trauma care, and it has to be accepted that this is not a

standard. HB 222 does not encourage malpractice but deals with the uniqueness of trauma.

{Tape: 2; Side: B; Approx. Time Counter: 5.7 - 9.5}

Proponents' Testimony:

Tom Ebzery, St. Vincent, Holy Rosary, St. James, and Wheatland Memorial Hospitals, provided written comments in support of HB 222.

EXHIBIT(jus48a10)

{Tape: 2; Side: B; Approx. Time Counter: 9.5 - 12.4}

Dr. Mark Rabold, American College of Emergency Physicians, said that three of the largest malpractice claim categories are trauma related--fractures, head injuries, and wounds. Trauma is a highly stressful environment where sometimes invasive and painful procedures must be done on intoxicated and uncooperative patients. These patients are often uninsured, they run up very large medical costs which they find difficult to pay, and negligence is assumed if the outcome does not meet expectations. These factors result in a predisposition to seek out a malpractice claim resulting in premiums careening out of control. He said his group had a 34% increase in malpractice rates in 2004 and can look forward to another increase in 2005. In addition, 44 out of 50 states have been termed in crisis or approaching crisis in regard to malpractice premium increases. Montana is approaching a potential crisis.

Dr. Rabold stated further that as emergency rooms close and trauma-related services are severely curtailed, experienced physicians retire or seek other states that are more litigation friendly. Most physicians who practice in Montana could do much better financially in other states. However, piling on prohibitive premiums will cause an exodus of physicians out of the state. Once it is started, it is very difficult to reverse. HB 222 will alleviate unnecessary strain.

{Tape: 2; Side: B; Approx. Time Counter: 12.4 - 22.7}

Dr. Mike Schweitzer, Rocky Mountain Health Network; Dr. Aaron Billin, Board Certified Family Physician, Hardin; and Dr. Fred McMurphy, Yellowstone Neurosurgical Associates, provided written comments in support of HB 222.

[EXHIBIT\(jus48a11\)](#)

[EXHIBIT\(jus48a12\)](#)

[EXHIBIT\(jus48a13\)](#)

{Tape: 2; Side: B; Approx. Time Counter: 22.7 - 22.8}

Dr. John Wilson, Practicing Orthopedic Surgeon, Billings, said that trauma care is reaching a crisis throughout the country and in the state and that malpractice is contributing to it. As an orthopedic surgeon, he is asked to cover the emergency room at least once a week. He often has to discuss a complex surgery with a person he does not know in a short period of time. Trauma patients have complex injuries and medical conditions that he does not have time to optimize. Most states have regional trauma centers, and unfortunately, Montana never will. He added that funding for trauma care is low while litigation for trauma care is very high--50% of orthopedic litigation is related to trauma. In 2002, he paid \$22,000 for malpractice insurance. In 2004, he paid \$53,000. **Dr. Wilson** said trauma care is reaching a crisis, and he requested the Committee's support of HB 222 as part of the solution.

{Tape: 3; Side: A; Approx. Time Counter: 0.1 - 0.2}

Mona Jamison, MT Orthopedic Society, said that HB 222 limits the noneconomic damages only in those claims resulting from a traumatic condition demanding that immediate attention be given. The Society supports HB 222 and the existing caps on noneconomic damages at \$250,000.

Pat Melby, MMA, spoke in support of HB 222.

Dr. John Galt, General Surgeon, Helena, said that general surgeons are quite often referred to as trauma. He cares for the most critically ill patients who require hospitalization or surgical intervention. He added that trauma care is a huge problem throughout the nation, is the number one killer of young people, and affects the people who participate in high-risk behavior. HB 222 will improve the care that can be provided in Montana.

{Tape: 3; Side: A; Approx. Time Counter: 5.6 - 7.2}

Mark Taylor, MHA; Joe Mazurek, BCBSMT; and Barbara Ranf, MT Chamber of Commerce, spoke in support of HB 222.

{Tape: 3; Side: A; Approx. Time Counter: 7.2 - 30.3}

Opponents' Testimony:

Al Smith, MTLA, provided written comments in opposition to HB 222. He also provided an article from the New York Times entitled Behind Those Medical Malpractice Rates and a copy of 25-9-411, MCA, showing that Montana currently has a cap on noneconomic losses.

[EXHIBIT\(jus48a14\)](#)

[EXHIBIT\(jus48a15\)](#)

[EXHIBIT\(jus48a16\)](#)

Mr. Smith said that HB 222 will do nothing but spur court challenges. There are no facts to back up the comments made about the increase in medical malpractice cases and no facts to back up the comments that the amounts of noneconomic damages are causing an increase in premiums. How can the state have a compelling interest in capping noneconomic damages at this point in time? He said that noneconomic damages are not just for pain and suffering. They are for amputations, severe disfigurement, permanent, life-long disabilities, and the inability to bear children because of medical malpractice. Society has determined these as important, valuable assets to the lives of human beings, and there is a value to them. That value is called noneconomic damages. HB 222 has no factual basis and there is nothing that the Committee has been presented that would justify a \$100,000 cap on noneconomic damages. There is absolutely no direct correlation between medical malpractice premiums that are collected and claims paid. HB 222 harms only people who have legitimate malpractice claims.

{Tape: 3; Side: B; Approx. Time Counter: 2.8 - 4.6}

Mr. Smith also expressed his concern about the definition of traumatic condition. He said that the state will be limiting people's rights based upon standards and conditions that nobody knows what they are. The nation has had years of patients giving up rights to help out the health care industry. HB 222 is too much.

Informational Testimony: None.

{Tape: 3; Side: B; Approx. Time Counter: 4.8 - 13.3}

Questions from Committee Members and Responses:

SEN. CROMLEY said that proponent testimony seemed to be all about insurance rates and not about persons affected by the statute. He asked if HB 222 reduced the noneconomic damages from \$250,000 to

\$100,000. **REP. ROBERTS** said that there was a certain amount of nervousness about the \$250,000 cap, as expressed by several attorneys, being taken to the Montana Supreme Court. Attorneys recognize the cap and have a great deal of play with the cap, but it has never been tested. No attorney wants a case that will allow, in essence, the Supreme Court to decide whether the \$250,000 cap is an actually accepted limit or not. **SEN. CROMLEY** said that he was thinking about those cases where there is malpractice and severe noneconomic damages, for example, a person, through malpractice, has the wrong leg amputated after a traumatic situation or a female who loses the right to bear children. He asked if **REP. ROBERTS** thought the damages should, in those cases, be reduced from \$250,000 maximum to \$100,000. **REP. ROBERTS** said that there are extenuating circumstances. People who must be operated on that quickly have not had time to be worked up to the degree that doctors normally do. Therefore, there is something else at risk, such as the permanent loss of life. There are things in place that a well-trained surgeon will put into effect to protect the patient. He could not envision the wrong leg ever being amputated in a trauma situation. **SEN. CROMLEY** said, if that is the case, there is no malpractice, so why is HB 222 needed. **REP. ROBERTS** said that although he has never seen such a case, there can be malpractice in trauma.

{Tape: 3; Side: B; Approx. Time Counter: 13.3 - 16.3}

SEN. JIM SHOCKLEY, SD 45, said that insurance portfolios and assets were more important in setting premiums than the claims paid. He asked for comment. **Mr. Ebzery** said that when SJR 32 began, the same refrain was heard from the MTLA that the only reason that malpractice premiums increased were because of losses in the stock market. It was the SJR 32 Committee's position to not get into the "tastes great, less filling" game in terms of premiums no matter who was at fault. The question was what could a group of health care providers do to point out why there were premium increases. He felt that the increases happened because of a series of causes. The fact is, whether it be insurance reform or some other cause, Montana has a problem. The SJR 32 Committee felt that any reform it could do would benefit the state. It believes that the increases are a causal situation and not strictly limited to the stock market.

{Tape: 3; Side: B; Approx. Time Counter: 16.3 - 20.2}

SEN. JEFF MANGAN, SD 12, asked if data was available that suggests that Montana was losing rural trauma specialists or services. **REP. ROBERTS** said that according to a recent newspaper article, Red Lodge was closing its Obstetric services because they were not delivering enough babies to cover the insurance.

The main providers of trauma--neurosurgeons, orthopedists, and general surgeons--are finding their time taxed because there does not appear to be many younger doctors entering the system to relieve the pressure. **SEN. MANGAN** said that under HB 222, damages for gross negligence or reckless or willful misconduct is excluded from the limit. He said if a surgeon amputated the wrong traumatic leg, for example, would that be determined as negligence or willful misconduct. **REP. ROBERTS** said, yes.

{Tape: 3; Side: B; Approx. Time Counter: 20.2 - 28.4}

SEN. GARY PERRY, SD 35, asked for a definition of noneconomic damages. **Dr. Schweitzer** said that the cap on noneconomic damages does not affect an injured patient's ability for financial losses. Noneconomic damages include pain and suffering, consortium, loss of a child or other circumstances that are not directly economic. Economic damage awards include full compensation for medical expenses, lost earnings, rehabilitation, a nurse or other household help following an injury. Economic damage awards can also fully compensate for life-long medical costs plus present and future lost income, unrecoverable, with no limit. **SEN. PERRY** asked if the purpose of a compensation award was to restore the economic loss of the claimant. **Mr. Ebzery** said, yes. **SEN. PERRY** asked what is the purpose of noneconomic damages beyond what is provided as exceptions to HB 222. **Mr. Ebzery** said that HB 222 attempts to place limits on noneconomic damages. By including the exceptions, any cap on economic damages less than \$250,000 do not apply under gross negligence and willful misconduct. **SEN. PERRY** asked how the constitutional reference made by the MTLA included noneconomic damages. **Mr. Ebzery** said that he disagreed with MTLA's characterization that HB 222 is a bar of the access to the courts. Although there has been no Supreme Court interpretation of the \$250,000 noneconomic cap, there is nothing to preclude a person from access to the courts for medical liability. HB 222 would not be deemed unconstitutional.

{Tape: 4; Side: A; Approx. Time Counter: 0.1 - 7.1}

SEN. DANIEL MCGEE, SD 29, asked if there was a cost delineation between increases related to litigation and increases related to the insurance business itself. **Dr. Wilson** said that the number and the cost of verdicts are increasing. His malpractice insurance from 2002 to 2004 went from \$22,000 a year to \$59,000 a year despite a clean slate. He did not have enough insurance-related information to break it down, but information indicates that over one-half of orthopedic litigation is trauma related. He said that a bad result is not malpractice that is why there are courts.

{Tape: 4; Side: A; Approx. Time Counter: 7.1 - 15.3}

SEN. MCGEE asked why insurance premiums have increased in Montana. **Ms. Jamison** said the increases are a result of many factors. The state has a severity and frequency of lawsuits increasing which has an impact. There are also various issues that are little pieces that affect the whole medical malpractice environment, such as ostensible agency, the "I'm sorry" bill, third-party bad faith, the reinsurance market issue, and the investment and bond market. She said that the bond market is the most conservative investment, and the Doctor's Company only invests in the bond market. When the bond market was good, the surplus, along with what Montana had already adopted which was the \$250,000 cap on noneconomic damages and the periodic payments for the annuities, helped to subsidize and keep rates down. When the bond market decreases, one of the forces helping to keep the rates low has diminished or has vanished.

{Tape: 4; Side: A; Approx. Time Counter: 15.3 - 18.5}

SEN. MICHAEL WHEAT, SD 32, said that in other states where the constitutionality of caps has been challenged, they have been found unconstitutional. He asked for comments. **Mr. Ebzery** agreed. **SEN. WHEAT** asked if the purpose of the SJR 32 study was to find the reasons and causes of why the premiums were increasing. **Mr. Ebzery** said, yes, adding that some of the issues related to insurance are some of the causes.

{Tape: 4; Side: A; Approx. Time Counter: 22.2 - 24.9}

Closing by Sponsor:

REP. ROBERTS during the SJR 32 study, the Committee asked insurance companies if they had lost money due to their investments and all replied, no, that they were losing because of their experience with the settlements in Montana. HB 222 attempts to ensure that the state realizes that there is compelling interest to access and affordability in Montana's health care delivery system. If HB 222 fails to pass, he believed the state is jeopardizing the services provided by the medical community.

HEARING ON HB 331

{Tape: 4; Side: B; Approx. Time Counter: 7.9 - 13.9}

Opening Statement by Sponsor:

REP. DAVID WANZENRIED (D), HD 97, said that HB 331 proposes to establish a joint underwriting association (JUA) which is a state-sponsored and privately financed and managed insurance pool for health care providers. Its purpose is to ensure that patients have access to health care in Montana. HB 331 addresses medical malpractice by ensuring that if either of the two carriers currently providing medical malpractice insurance in Montana were to leave, those covered by that carrier would have access to malpractice insurance.

{Tape: 4; Side: B; Approx. Time Counter: 13.9 - 26.0}

Proponents' Testimony:

Pat Melby, MMA, said that of all of the bills related to medical malpractice insurance introduced in the 2005 Session, HB 331 is the most important to physicians of the MMA because it ensures future access to medical malpractice insurance should something drastic happen. He provided information on States with "Joint Underwriting Associations" for Medical Malpractice Insurance.

EXHIBIT(jus48a17)

Mr. Melby said that a JUA is simply grouping together of casualty insurers to provide for the administration of a company to issue medical malpractice policies where the private sector is not filling the need. A JUA, by intent and design, is an insurer of last resort and will not reduce insurance rates, will not prevent other carriers from leaving the state, and will not address the underlying issues concerning medical malpractice. It is also not the exclusive provider of medical malpractice insurance. It merely ensures that medical malpractice insurance is available to physicians when other insurance providers cease writing. He urged the Committee's support of HB 331.

{Tape: 4; Side: B; Approx. Time Counter: 26.0 - 27.8}

Dr. Mike Schweitzer, Rocky Mountain Health Network, said that although HB 331 is a controversial bill, he looks at it as a safety net. He provided a personal experience in which there was an amount of time that he could not work because of the lack of coverage.

{Tape: 4; Side: B; Approx. Time Counter: 27.8 - 29.7}

Mark Taylor, MHA; Tom Ebzery, St. Vincent, Holy Rosary, St. James, and Wheatland Memorial Hospitals; and REP. ROBERTS, HD 56, spoke in support of HB 331.

{Tape: 5; Side: A; Approx. Time Counter: 0.1 - 0.2}

Mona Jamison, The Doctor's Company, said that although The Doctor's Company is in a difficult position regarding HB 331, it will support HB 331 with the proposed amendments.

EXHIBIT(jus48a18)

Ms. Jamison said that the amendment specifically exempts The Doctor's Company from being a member of the JUA. She said the cost of medical malpractice insurance, which causes the trigger of HB 331, means that The Doctor's Company raises its rates and makes premiums very expensive for physicians or a category of physicians. If The Doctor's Company is part of the issue because its rates are so high that it triggers HB 331, why should they be a member of the JUA? She also suggested that the Committee strike "cost" from HB 331. The Committee heard from proponents that this safety net will result in, not cheap insurance, but very expensive medical malpractice insurance. She said that if cost is triggering it and the trigger results in high insurance, she was unsure whether cost was needed as the trigger because there are still one or two companies providing the insurance.

Al Smith, MTLA; spoke in support of HB 331 as good public policy.

Opponents' Testimony:

James Jinks, United Service Automobile Association (USAA), spoke in opposition to HB 331.

Roger McGlenn, Executive Director, Independent Insurance Agents of Montana (IIAM), cited and discussed 33-2-302, MCA, provided an approved risk list that independent insurers carry, and spoke in opposition to HB 331.

EXHIBIT(jus48a19)

Larry Kibbee, Property Casualty Insurers Association of America (PCIAA), discussed alternatives to the formation of a JUA, including a voluntary market assistance plan that was formed in Washington. He also provided a list of other insurance carriers who still write insurance policies within the state.

EXHIBIT(jus48a20)

{Tape: 5; Side: B; Approx. Time Counter: 0.6 - 0.7}

Dave Bauer, State Farm Insurance, said that State Farm is the largest writer of automobile and house insurance. Under HB 331, there are three ways that State Farm could potentially be assessed: start-up costs; an annual assessment to cover the cost of running the JUA; and an assessment to fund any deficit. The assessments would result in increased premiums to State Farm policyholders. He opposed HB 331.

Jacqueline Lenmark, AIA, said that medical malpractice is a line of insurance that some of the members of AIA write. According to proponent testimony on HB 331, it was not introduced to address the cost of malpractice insurance. However, the expressed language in HB 331 directly contradicts that contention because it is written in the disjunctive, not the conjunctive. It can be cost, and that cost alone, that will trigger the formation of the JUA.

Ms. Lenmark further stated that HB 331 states that the rates that are going to be charged by the JUA are subject to Montana law. Rates for medical malpractice insurance are driven primarily by experience. Insurance cannot just make up a rate in Montana willy nilly. Under 33-16-201, insurance companies must file the rate that they intend to use with the Commissioner of Insurance. The Commissioner has the authority to disapprove any rate that he or she finds to be inadequate, excessive, or unfairly discriminatory. The statute expressly states that consideration must be given, when applicable, to past and prospective loss experience within and without the state. If an individual feels that they are aggrieved by the rate that a company files, there is a hearing and appeal process for that aggrieved person to challenge the rate. HB 331 seems to imply that those statutory procedures may not be in place which makes insurance companies very concerned that those standards will not be followed.

HB 331 also requires the JUA to offer both claims made and occurrence policies. The selection of which policy is written for the health care provider is in the provider's discretion. A claims-made policy provides coverage for the claims that are made and filed during the policy period. This is the most common type of insurance written for medical malpractice. Occurrence policies cover an event that took place during the time that the policy was in effect, regardless of when the claim is filed. HB 331 is silent on what will happen if a JUA issues an occurrence policy and then later the Insurance Commissioner determines that the JUA is no longer necessary, who picks up the "tail"--common term referred to when the policy period is over.

AIA also has serious concerns about the assessment and participation in the JUA. HB 331 is sweeping, and she asked the Committee to consider the definition of casualty insurance in the insurance code and all of the different types of companies that are going to be required to step up and be a medical malpractice company when they have not chosen to write medical malpractice insurance.

{Tape: 5; Side: B; Approx. Time Counter: 15.0 - 18.3}

John Metropoulos, Farmers Insurance Group, said that Montana has 38 medical malpractice insurers that report net premiums, not two. He encouraged the Committee to review the final report of the SJR 32 Subcommittee entitled DIAGNOSING THE AILMENT--PRESCRIBING THE CURE.

EXHIBIT(jus48a21)

Mr. Metropoulos said that the SJR 32 Subcommittee did not consider putting all property/casualty insurers into funding the JUA until September 2004. It is fundamentally unfair to property/casualty insurers and policyholders to have to fund the JUA, and the Subcommittee recognized that until the very end of its meetings. He questioned why that changed.

{Tape: 5; Side: B; Approx. Time Counter: 18.2 - 21.8}

Don Allen, MT Association of Insurance and Financial Advisors (MTAIFA), and Joe Mazurek, BCBSMT, spoke in opposition of HB 331.

{Tape: 5; Side: B; Approx. Time Counter: 21.8 - 21.9}

Frank Cote, Farmers Union Mutual Insurance Company, spoke in opposition to HB 331 because he felt it to be blatantly unfair to property/casualty insurance companies.

{Tape: 5; Side: A; Approx. Time Counter: 2.2 - 2.3}

Informational Testimony:

Patrick Driscoll, Insurance Commissioner's Office, said that there has been the suggestion that there is not a crisis in Montana. Although it may be technically true, in a market as small as Montana's, the state is 10 minutes away from a crisis at any time. He submitted that every ratepayer in Montana would benefit from having available medical services. If there is a medical malpractice insurance crisis, all retirees who live in Montana and who use medical services in an amount disproportionate compared to the rest of the population, would

benefit from going to a doctor as opposed to having a doctor being unable to provide those services.

Mr. Driscoll added that a JUA could be thought of as a layered defense. The state does not control the insurance market. The market is nationwide. The JUA would be in addition to those things applauded by the insurance industry, such as surplus lines, captive insurance both in- and out-of-state, and a voluntary market assistance plan. He said that the voluntary market assistance plan, such as the plan imposed in Washington, was done even though the Commissioner of Insurance had a JUA option. Montana's Insurance Commissioner's Office is in support of HB 331 in concept, but he also support the other options suggested or any other option that is necessary to maintain adequate medical malpractice insurance, therefore, adequate health services in Montana.

Questions from Committee Members and Responses:

{Tape: 5; Side: A; Approx. Time Counter: 5.1 - 7.2}

SEN. CROMLEY asked if the two carriers currently in Montana--Utah Medical and The Doctor's Company--operated on a regional basis rather than a national basis. **Mr. Melby** said that The Doctor's Company operates in a number of states and is centered in California, while Utah Medical operates in Utah and Montana. **SEN. CROMLEY** asked if other national companies offered medical malpractice insurance but not in Montana. **Mr. Melby** was unsure about the national statistics, but said that there are some that still write in Montana. However, they are not writing new policies only renewing the policies of a few of the physicians that they currently insure. He added that 66% of the physicians in Montana are insured by two companies--one that has the state on hold and is not writing any new insurance policies and the other that is \$5 million in the hole in Montana.

{Tape: 5; Side: A; Approx. Time Counter: 7.2 - 7.3}

SEN. JON ELLINGSON, SD 49, asked that **Mr. Melby** speak to the concerns of the opponents. **Mr. Melby** said that the MMA does not believe that there is a critical enough mass of physicians available to create a captive insurer, making it a nonviable option. Surplus lines are not subject to the same regulation as admitted carriers. They may be fine for rodeos and stockcar races, but the premiums are very high and they are not included in the Insurance Guarantee Association. In addition, the Committee may want to strike references to occurrence-based policies from HB 331 because there is a concern that, if a policy was issued on an occurrence-based method and the JUA was

terminated, an occurrence may happen sometime down the road. It then becomes an issue. Speaking to a voluntary market assistance plan, **Mr. Melby** asked why Montana was not doing a voluntary market assistance plan currently to avoid the activation of a JUA. If other insurance companies writing medical malpractice were interested in Montana, why are they not doing it now?

Referring to the USAA not wanting to write medical malpractice insurance, **Mr. Melby** said that they did not have to. The JUA writes the insurance, companies only participate along with every other casualty company that writes in Montana. USAA, Farmers Insurance, all of those companies that operate in the states that have JUAs are involved in JUAs. This is not a new concept to them. Opponent testimony said nothing about what happened to their policyholders because a JUA was formed. They did not give the Committee that information because a JUA did not hurt them or their policyholders. JUAs would benefit their policyholders by ensuring that health care is available.

In every piece of JUA legislation written in the 22 states that have JUAs, casualty insurance carriers are included. This is not a new, novel idea. JUAs have successfully operated in many of those states.

{Tape: 5; Side: A; Approx. Time Counter: 13.4 - 13.5}

SEN. MCGEE asked why he should vote for a bill that will increase the various casualty insurance premiums while at the same time putting money into a pool for medical malpractice that are already high which keeps the cost of medical treatment high. He asked that it be addressed in the sponsor's closing.

Closing by Sponsor:

REP. WANZENRIED said he found it surprising that anyone would argue that Montana did not have a crisis on medical malpractice insurance. HB 331 can be improved, and he never characterized it as being perfect. Addressing **SEN. MCGEE'S** question, he said that two days were given to the insurance industry to lobby against HB 331 about that very issue. He believed that the language in HB 331 safeguards his and **SEN. MCGEE'S** constituents against paying higher premiums for medical malpractice. HB 331 is intended to provide a firewall so that the policyholders for medical malpractice, alone, bear the costs. Although there is an assessment up front, HB 331's intent is to prevent the cost from being passed along to policyholders of casualty insurance.

ADJOURNMENT

Adjournment: 12:00 A.M.

SEN. MIKE WHEAT, Chairman

MARI PREWETT, Secretary

LOIS O'CONNOR, Transcriber

MW/mp

Additional Exhibits:

EXHIBIT ([jus48aad0.PDF](#))